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Supreme Court, U.S.
FILED
FEB 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

BOSE CORPORATION,
PETITIONER,

v.

CONSUMERS UNION OF THE UNITED STATES, INC.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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Question Presented

Whether FED. R. APP. 39(e), which specifically provides only for "the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal," precludes taxation of letter-of-credit expense as a taxable item of cost on appeal, in addition to the premium on a supersedeas bond.

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CONSUMERS UNION OF THE UNITED STATES, INC.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Petitioner, Bose Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit

entered in this proceeding on December 1, 1986.

Citations to Opinions Below

The opinion of the Court of Appeals on costs, A1-A5[1], is reported in 806 F.2d 304.

The opinion of the United States Court for the District of Massachusetts on liability, X37-167, is reported in 508 F. Supp. 1249, 7 Media L. Rep. (BNA) 1069, and on damages, X168-200, in 529 F. Supp. 357, 7 Media L. Rep. (BNA) 2481. The opinion of the Court of Appeals on liability, X1-X36, is reported in 692 F.2d 189, 8 Media L. Rep. (BNA)

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[1]Reference to the Appendix, infra A1-A14, is to "A" page numbers. Reference to the separate appendix accompanying the petition in 466 U.S. 485 is to "X" page numbers. Reference to the record in the court below is to "R" page numbers.

2391.

The opinion of the District Court denying respondent's motion for summary judgment is reported in 84 F.R.D. 682, 210 U.S.P.Q. (BNA) 645, 5 Media L. Rep. (BNA) 2404, in denying repondent's motion to dismiss in 181 U.S.P.Q. (BNA) 543, in certifying a question of state law to the Massachusetts Supreme Judicial Court in 19 Fed. R. Serv. 2d (Callaghan) 442, and in requiring petitioner to plead special damages in 16 Fed. R. Serv. 2d (Callaghan) 1090. The opinion of the Massachusetts Supreme Judicial Court ruling that the filing of the complaint did not toll the statute of limitations for respondent's counterclaims is reported in 367 Mass. 424, 326 N.E.2d 8.

Jurisdiction

The judgment of the Court of Appeals, A13-14, was entered on December 1, 1986, and this petition for certiorari is being filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Federal Rule of Appellate Procedure Involved

Rule 39. Costs.

(e) COSTS ON APPEAL TAXABLE IN THE DISTRICT COURTS. Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.

Statement

Petitioner filed a complaint in the United States Court for the District of Massachusetts on February 23, 1971, to commence this civil action (R1). Jurisdiction was based on diversity of citizenship, 28 U.S.C. § 1332(a)(1), on the Lanham Act, 15 U.S.C. § 1121 and 28 U.S.C. § 1338(a) and (b). X38-39.

After a 19-day nonjury trial, the District Court found respondent liable to petitioner. X37-167, 508 F. Supp. 1249 (D. Mass. 1981). In the trial on the issue of damages the District Court awarded petitioner damages in the amount of $115,296.00. X168-200, 529 F. Supp. 357 (D. Mass. 1981). On February 8, 1982, the District Court awarded petitioner $210,905.64, including interest and costs (R1).

Respondent appealed to the Court of

Appeals and posted a supersedeas bond to preclude enforcement of the judgment pending appeal (R3-4).

The Court of Appeals reversed the judgment of the District Court. X1-36. 692 F.2d 189 (1st Cir. 1982). The Court granted certiorari and affirmed. 466 U.S. 485 (1984).

After remand to the District Court, respondent filed a bill of costs (R5), which included the following item: "Cost of Supersedeas Bond $6,691.54." Respondent filed a memorandum with appended exhibits disclosing that the "Cost of Supersedeas Bond" consisted of $1,473.00 for the premium paid for cost of supersedeas bond (R11,15) and $5,218.54 for a letter of credit from The Bank of New York (R11,14).

This memorandum with appended exhibits filed after remand from this Court was the first time respondent informed petitioner

or the District Court that respondent had incurred $5,218.54 for the letter of credit as a "Cost of Supersedeas Bond."

The Clerk entered an order on April 7, 1986, taxing as items of costs on appeal both the premium for cost of supersedeas bond and the amount claimed for the letter of credit (R22-23). A11-12. Petitioner moved for review by the District Court with respect to the amount of $5,218.54 awarded for the letter of credit (R24). The District Court denied relief by the following order entered on April 15, 1986, "After review, the costs taxed by the Clerk stand. AAC, CJ, April 15, 1986 (R24)." A13.

Petitioner then filed a timely notice of appeal to the Court of Appeals from the order (R2).

After ordering that oral argument would not be heard, the Court of Appeals

said:

> Fed.R.App.P. 39(e) provides, in relevant part, that "the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal . . . shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule." The rule does not address costs incident to obtaining the premium [sic] and, by Bose's logic, does not encompass those collateral costs.
>
> In a pre-Rule 39 case, the Ninth Circuit allowed recovery of expenses incurred in "arranging with bankers to furnish indemnity." Sunkist Growers, Inc. v. Winckler and Smith Citrus Products, 316 F.2d 275, 276 (9th Cir. 1962). The Second Circuit seemed to have concurred with this approach in Trans World Airlines, Inc. v. Hughes, 515 F.2d 173, 177 (2d Cir. 1975) ("[w]hen a judgment is reversed . . . the costs of obtaining a supersedeas bond have long been held to be a proper item of costs. . . ." (citations omitted)). However, the Second Circuit may have limited TWA to its facts in Lerman v. Flynt Distributing Co., Inc., 789 F.2d 164 (2d Cir. 1986).
>
> The facts in Lerman indicate that the appellant (the party that ultimately prevailed)

borrowed a million dollars at 15% interest and used it to secure a supersedeas bond. It knew when it transacted with the bonding company that it was to receive no interest from the bonding company on the million dollars. After successful appeal, the appellant sought to recover the difference between the amount it paid in interest payments and the amount it could have made had it invested the million dollars at prevailing money market rates. The appeals court reversed the district court's taxation of costs for lost interest.

It seems to us that the costs sought to be recovered in Lerman were unreasonable. For instance, it is not at all clear why the borrowing party did not purchase a certificate of deposit with its million dollars, once it knew that the bonding company would pay it no interest, instead of simply handing over the money interest-free. That it made no attempt to mitigate its expenses but, rather, acted unreasonably would constitute for us a sufficient basis for the Lerman decision. But the court announced a per se ruling that "borrowing expense, sought in addition to the premium on a supersedeas bond, is not a permissible item of taxable appellate costs." 789 F.2d at 167.

> We respectfully disagree. We review the district court's taxation of costs for abuse of discretion. See Farmer v. Arabian American Oil Co., 379 U. S. 227, 85 S.Ct 411, 13 L.Ed.2d 428 (1964). In this case there is no suggestion that the charge for a letter of credit was either unreasonable or resulted in any greater total cost than a supersedeas bond without supporting collateral. Under the circumstances, we are not inclined to disturb the district court's exercise of discretion. A2-5, 806 F.2d at 305.

The Court of Appeals did not discuss the three factors regarded by the Second Circuit in Lerman as essential to its decision in TWA: 1) the letter of credit was in lieu of posting a supersedeas bond, 2) the alternate arrangements were agreed to by the party opposing appeal and approved by the District Court, and 3) the alternate arrangements cost less than supersedeas bond would have cost. 789 F.2d at 166.

Nor did the Court of Appeals mention

the reliance by the Second Circuit on this Court's statement in Farmer, that district judges do not have "unrestrained discretion to tax costs to reimburse a winning litigant for every expense he has seen fit to incur in the conduct of his case." 379 U.S. at 235, 85 S. Ct. at 416. 789 F.2d at 167.

Reasons for Granting the Writ

1. The decision of the Court of Appeals is directly in conflict with Lerman v. Flynt Distributing Co., 789 F.2d 164 (2d Cir. 1986).

The Court of Appeals recognized this conflict when it said, "But the court [of Appeals for the Second Circuit] announced a per se ruling that 'borrowing expense, sought in addition to the premium on a supersedeas bond, is not a permissible item of taxable appellate cost.' 789 F.2d at 167.

We respectfully disagree." A-5, 806 F.2d at 305.

There is no logical difference between letter-of-credit expense, sought in addition to the premium on a supersedeas bond, and "borrowing expense, sought in addition to the premium on a supersedeas bond," which "is not a permissible item of taxable appellate costs." 789 F.2d at 167. Thus, the ruling by the court below that letter-of-credit expense, sought in addition to the premium on a supersedeas bond, is a permissible item of taxable appellate costs conflicts with the ruling of the Second Circuit that "borrowing expense, sought in addition to the premium on a supersedeas bond, is not a permissible item of taxable appellate costs."

2. The decision of the Court of Appeals is in conflict with Farmer v. Arabian American Oil Co., 379 U.S. 227

(1964). Both the court below, A5, 806 F.2d at 305, and the Second Circuit in Lerman, 789 F.2d at 167, relied on Farmer to reach diametrically opposite results.

The court below cited Farmer as authorizing review for abuse of discretion, A5, 806 F.2d at 305, while ignoring the directions of this Court that "the discretion given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute." 379 U.S. at 235.

It logically follows that the discretion given district judges to tax costs on appeal should be sparingly exercised with reference to expenses not specifically allowed by FED. R. CIV. P. 39(e).

Regardless of whether the court below or the Second Circuit correctly interpreted the decision of this Court in Farmer, it is important that this Court resolve this

apparent conflict between circuits on the interpretation of this leading decision by this Court on discretion to tax costs.

> Items proposed by winning parties as costs should always be given careful scrutiny. Any other practice would be too great a movement in the direction of some systems of jurisprudence that are willing, if not indeed anxious, to allow litigation costs so high as to discourage litigants from bringing lawsuits, no matter how meritorious they might in good faith believe their claims to be. 379 U.S. at 235.

3. The Federal Rules of Appellate Procedure for the United States Court of Appeals adopted December 4, 1967, effective July 1, 1968, were adopted to uniformly "govern procedure in appeals to United States Courts of Appeals from the United States district courts . . .." FED. R. APP. P. 1. Manifestly, conflicting interpretations of an appellate rule by different courts of appeals of equal dignity is inconsistent with the basic policy

behind adoption of the rules and requires exercise of the supervisory authority of this Court to insure uniform interpretation of these rules in all courts of appeals.

4. Proper interpretation of Rule 39(e) is important in every federal case in which a losing party in the trial court posts a supersedeas bond. Resolution of the question presented is important to both litigants posting and litigants secured by a supersedeas or other bond posted to preserve rights pending appeal. Regardless of whether the Court agrees with the First or Second Circuit, it is important that a uniform standard be adopted.

The importance of this Court reviewing excessive taxation of costs by lower courts is evident from Crawford Fitting Co. v. J. T. Gibbons, Inc., (86-328, and companion case), certiorari granted on December 1, 1986, to determine whether and, if so,

when, federal courts in nondiversity cases may tax as costs the fees of noncourt appointed expert witnesses in excess of the amount allowed under 28 U.S.C. § 1821. District judges do not have "unrestrained discretion to tax costs to reimburse a winning litigant for every expense he has seen fit to incur in the conduct of his case." Farmer v. Arabian American Oil Co., 379 U. S. 227, 235 (1964).

5. The Second Circuit Court of Appeals was correct in ruling that expense, sought in addition to the premium on a supersedeas bond, is not a permissible item of taxable appellate costs, and the First Circuit Court of Appeals was in error in leaving taxation of the letter-of-credit costs, more than three times the premium paid for cost of supersedeas bond authorized by Rule 39(e), to the discretion of the District Court.

The Second Circuit Court of Appeals explained:

> A court exercising its discretion concerning the imposition of costs where large or unusual expenses are involved should consider whether court approval of the expenses was sought before they were incurred.[2] See 6 Moore's Federal Practice ¶ 54.70[5] (1985). In Farmer v. Arabian American Oil Co., supra, the Supreme Court made clear that district judges do not have "unrestrained discretion to tax costs to reimburse a winning litigant for every expense he has seen fit to incur in the conduct of his case." 379 U.S. at 235, 85 S. Ct. at 416. Because FDC's borrowing expense, sought in addition to the premium on a supersedeas bond, is not a permissible item of taxable appellate costs, the supplemental judgment of the District Court is vacated. 789 F.2d at 167.

The Court of Appeals in stating that

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[2] FDC's contention that Judge Werker approved the interest costs is totally without merit. The statement referred to by FDC to support this contention, taken in context, reveals only that Judge Werker approved of Lerman's bearing the normal cost of a bond, i.e., the bond premium allowed by Rule 39(e).

the Second Circuit may have limited TWA ignored the explanation of TWA by the Second Circuit in Lerman. The Second Circuit announced three factors essential to its decision in TWA, supra 10, including that "the alternate arrangements in lieu of a supersedeas bond were agreed to by the party opposing the appeal and approved by the District Court." 789 F.2d at 166. Not only did respondent not seek agreement of petitioner or approval by the District Court, but respondent did not even disclose the existence of the letter of credit until after remand by this Court. Respondent obtained the letter of credit, not as an alternate arrangement in lieu of a supersedeas bond, but in addition to obtaining a supersedeas bond and without the agreement of petitioner or approval of the District Court.

It can hardly be doubted that the

Advisory Committee was aware of the pre-Rule 39 case of Sunkist Growers, Inc. v. Winckler and Smith Citrus Prod., 316 F.2d 275, 276 (9th Cir. 1962) relied upon by the court below. A2-A3, 806 F.2d at 305. However, the Advisory Committee expressly limited cost recovery under Rule 39(e) to "the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, ..." The Advisory Committee explained the foundation for that language, "Provision for taxation of the cost of premiums paid for supersedeas bonds is common in the local rules of district courts and the practice is established in the Second, Seventh, and Ninth Circuits. Berner v. British Commonwealth Pacific Air Lines, Ltd., 362 F.2d 799 (2d Cir. 1966); Land Oberoesterreich v. Gude, 93 F.2d 292 (2d Cir. 1937); In re Northern Ind. Oil Co., 192 F.2d 139 (7th Cir., 1951); Lunn v.

F. W. Woolworth, 210 F.2d 159 (9th Cir., 1954)." Advisory Committee's Note. If the Advisory Committee wanted to allow recovery of expenses incurred in "arranging with bankers to furnish indemnity," they knew how to use the English language to achieve such a result. "[T]he discretion given district judges to tax costs should be spraringly exercised with reference to expenses not specifically allowed by statute [or rule]." Farmer v. Arabian American Oil Co., 379 U.S. 227, 235 (1964).

To call the cost of obtaining the letter of credit as "incident to obtaining the premium" when the letter-of-credit costs were three times the premium is tail-wagging-the-dog reasoning that represents such a clear departure from the interpretation of the English language in rules of procedure as to require exercise of the supervisory authority of this Court.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1474

BOSE CORPORATION,

Plaintiff, Appellant,

v.

CONSUMERS UNION OF U.S., INC.,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Andrew A. Caffrey,
U.S. District Judge]

Before

Coffin, Bownes, and Breyer,

Circuit Judges.

December 1, 1986

Per Curiam. Appellant, Bose Corporation, appeals from a district court

decision upholding the taxation of particular costs against it. The pertinent costs taxed are $1,473.00 premium for a supersedeas bond and $5,218.54 for a letter of credit to secure the bond. Bose objects to the taxation of costs for the letter of credit on grounds that such costs are not authorized by Fed.R.App.P. 39(e) or by decisional law.

Fed.R.App.P. 39(e) provides, in relevant part, that "the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal. . . shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule." The rule does not address costs incident to obtaining the premium [sic] and, by Bose's logic, does not encompass those collateral costs.

In a pre-Rule 39 case, the Ninth

Circuit allowed recovery of expenses incurred in "arranging with bankers to furnish indemnity." Sunkist Growers, Inc. v. Winckler and Smith Citrus Products, 316 F.2d 275, 276 (9th Cir. 1962). The Second Circuit seemed to have concurred with this approach in Trans World Airlines, Inc. v. Hughes, 515 F.2d 173, 177 (2d Cir. 1975) ("[w]hen a judgment is reversed. . .the costs of obtaining a supersedeas bond have long been held to be a proper item of costs. . .." (citations omitted)). However, the Second Circuit may have limited TWA to its facts in Lerman v. Flynt Distributing Co., Inc., 789 F.2d 164 (2d Cir. 1986).

The facts in Lerman indicate that the appellant (the party that ultimatelty [sic] prevailed) borrowed a million dollars at 15% interest and used it to secure a

supersedeas bond. It knew when it transacted with the bonding company that it was to receive no interest from the bonding company on the million dollars. After successful appeal, the appellant sought to recover the difference between the amount it paid in interest payments and the amount it could have made had it invested the million dollars at prevailing money market rates. The appeals court reversed the district court's taxation of costs for lost interest.

It seems to us that the costs sought to be recovered in Lerman were unreasonable. For instance, it is not at all clear why the borrowing party did not purchase a certificate of deposit with its million dollars, once it knew that the bonding company would pay it no interest, instead of simply handing over the money interest-free. That it

made no attempt to mitigate its expenses but, rather, acted unreasonably would constitute for us a sufficient basis for the Lerman decision. But the court announced a per se ruling that "borrowing expense, sought in addition to the premium on a supersedeas bond, it not a permissible item of taxable appellate costs." 789 F.2d at 167.

We respectfully disagree. We review the district court's taxation of costs for abuse of discretion. See Farmer v. Arabian American Oil Co., 379 U.S. 227 (1964). In this case there is no suggestion that the charge for a letter of credit was either unreasonable or resulted in any greater total cost than a supersedeas bond without supporting collateral. Under the circumstances, we are not inclined to disturb the district court's exercise of discretion.

Affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Bose Corporation Plaintiff	)	
v.	)	CA 71-481-C
Consumers Union of United States, Inc. Defendant	)	

MEMORANDUM AND ORDER ON COSTS

This matter is before the Clerk for taxation of costs in accordance with Defendant's verified Bill of Costs filed September 18, 1984. See 28 U.S.C. 1920; F.R.Civ. P. 54(d). Both parties have submitted memoranda.

Bose Corporation ("Bose) filed its complaint in 1971. Consumers Union of United States, Inc. ("CU") answered and counterclaimed against Bose. The counterclaims were dismissed on motion in 1975. After nonjury trial, judgment was entered for Bose but subsequently reversed by the Court of Appeals. On petition for

writ of certiorari, the United States Superior [sic] Court granted the writ and affirmed the decision of the Court of Appeals.

CU now seeks taxation of costs in the amount of $20,297.64. Bose Corporation concedes that the following costs should be taxed:

Costs as shown on Mandate of Court of Appeals	$3,000.00
Fees of the Clerk (filing fee for Notice of Appeal)	5.00
Cost of Supersedas [sic] Bond (premium only)	1,473.00
Total	$4,478.00

Bose opposes all other costs.

Bose contends that in the instant case there is no prevailing party, since CU counterclaimed for affirmative relief and neither party prevailed in its claims.

The cases cited by Bose are distinguishable. Srybnik v. Epstein, 230

F2d 683 (2d Cir. 1956), Kropp v. Ziebarth, 601 F 2d 1348 (8th Cir. 1979), Kalkowski v. Ronco, Inc., 424 F. Supp. 343 (N.D. Ill., 1976) and Magee v. McNany, 11 F.R.D. 592 (W.D. Pa. 1951) all involved complaints and counterclaims that both went to trial. In Srybnik the Court of Appeals affirmed the trial court's denial of costs in the exercise of discretion. The Kropp case was not concluded in the District Court in view of the appellate opinion. Kalkowski was a close and difficult equity case involving a patent where the Court exercised its discretion to require both parties to bear their own costs. The jury in Magee found both parties negligent.

Chief Judge Caffrey's opinion in United States v. Arthur N. Olive Co., Inc., 30 F.R.D. 139 (D. Mass. 1962) is decisive with regard to costs shown on the mandate issued by the Court of Appeals (which costs

are not challenged here) and with respect to costs taxable in the District Court but necessarily incurred in taking the appeal. CU is the prevailing party with regard to these areas.

I also find that CU is the prevailing party with respect to costs associated with the defense of this action, including the pretrial and trial stages, even though not related to the appeal. I would deny any costs associated with CU's prosecution of its counterclaim, and Bose will have an opportunity to file its own bill of costs limited to those incurred in defense of the counterclaim.

I now turn to the specific items claimed, as to which there are objections.

1. Fees of the Clerk $70.00

$5.00 will be allowed. The claim for $65.00 is denied by agreement of the parties as duplicative of the costs shown

on the mandate from the Court of Appeals.

2. Fees of the court reporter $5,309.05

$3,852.50 will be allowed. The remainder of the claim will be denied without prejudice to providing further support.

CU has not adequately demonstrated a need for daily copy. The need for expedited copy (to be delivered within 7 days) seems even more tenuous since its usefulness to the conduct of the trial is not obvious and it has not been shown that the Court would have insisted on post trial briefs in advance of counsel receiving ordinary-rate transcripts. Finally, I cannot find that the $16.80 and $45.00 items were necessarily obtained for use in the case on the basis of the current submissions.

3. Docket fees $20.00

Having found that CU is the prevailing party, this item is allowed.

4. Costs incident to the taking depositions $3,858.85

The claimed amount will be allowed, after review of the submissions.

5. Costs as shown on Mandate of Court of Appeals $3,000.00

The entire amount is allowed, the District Court having no discretion, and by agreement of the parties.

6. Cost of Supersedeas Bond $6,691.54

This amount will be allowed in its entirety. CU points out that a letter of credit was required to obtain the supersedeas bond. Bose does not suggest that the amount charged for the letter of credit was unreasonable but that this fee does not fall within F.R.A.P. 39(e)'s wording that the "premiums paid . . . shall be taxed . . . ." Although I have found no cases, in my view, Bose's construction of "premiums paid" is too narrow. The entire

amount was an expense necessarily incurred to obtain a stay of execution pending appeal.

7. Costs of photographs $348.20

This amount will be allowed.

In summary, costs will be taxed in favor of CU in the amount of $17,776.09. CU's claim for docketing fee in the amount of $65.00 is denied, and its further claim for expedited, daily and other transcripts in the amount of $2,456.55 is denied without prejudice to providing further support on or before May 1, 1986. Bose may also file a bill of costs related to the counterclaim by May 1, 1986. In the absence of a further submission, the ruling will be final at that time.

GEORGE F. McGRATH, Clerk

s/Daniel F. Loughry
Deputy Clerk
April 7, 1986

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BOSE CORPORATION, Plaintiff	Civil Action No. 71-481-C
v.	
CONSUMERS UNION OF U.S., INC., Defendant	

After review, the costs taxed by the Clerk stand.

AAC
CJ
April 15, 1986

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1474

BOSE CORPORATION,
Plaintiff, Appellant,

v.

CONSUMERS UNION OF U.S., INC.,
Defendant, Appellee.

JUDGMENT

Entered: December 1, 1986

This cause came on to be submitted on

the briefs and the original record on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, It is now here ordered, adjusted and decreed as follows: The judgment of the district court is affirmed.

By the Court:

Francis P. Scigliano
Clerk

Supreme Court, U.S.
FILED
MAR 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1405

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BOSE CORPORATION,

Petitioner,

vs.

CONSUMERS UNION OF UNITED STATES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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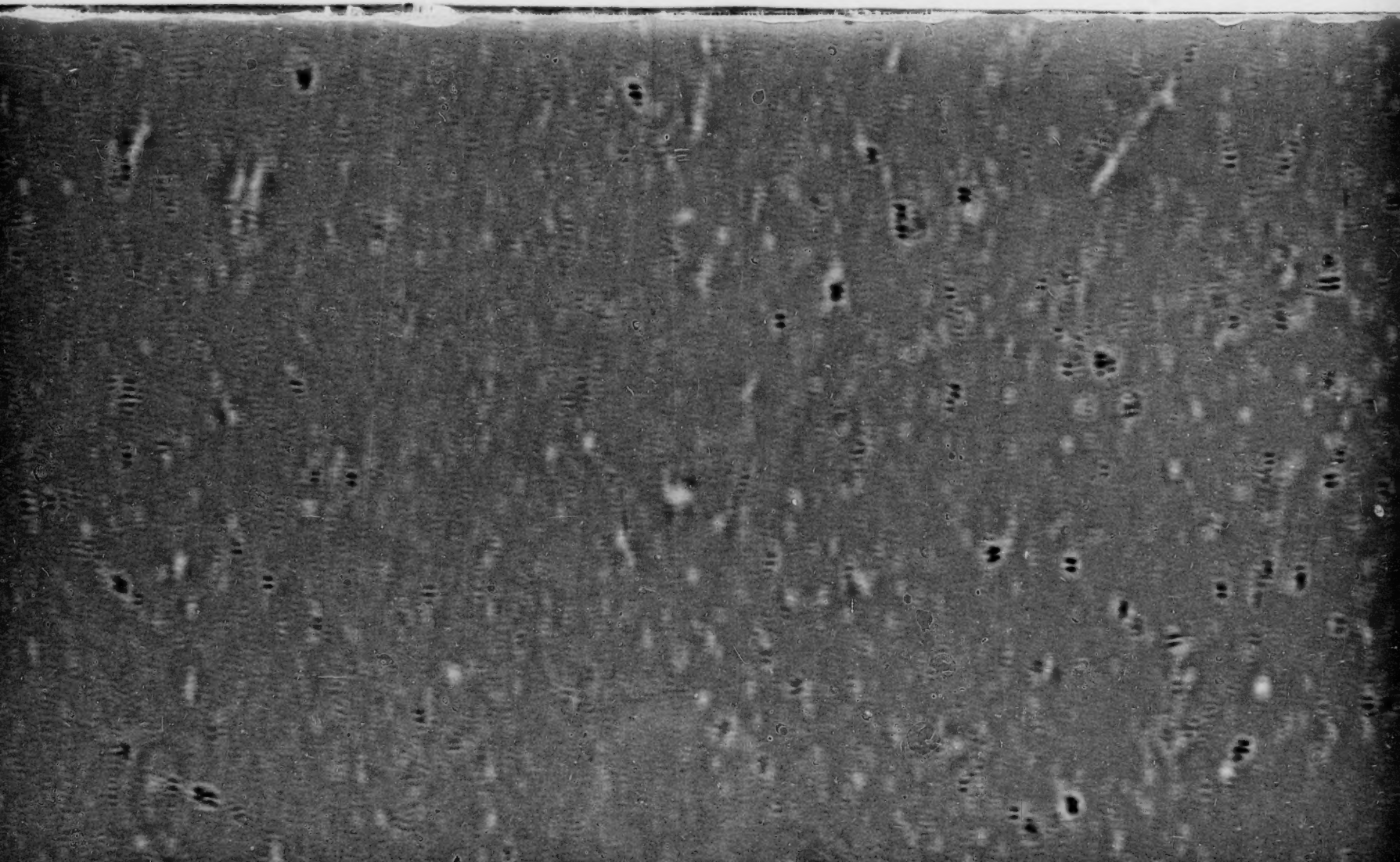

Question Presented

Whether the Court of Appeals was correct in finding that the District Court had not abused its discretion by taxing as costs against petitioner the expense of $5,218.54 incurred by respondent for a letter of credit that the bonding company required to be posted as collateral for a supersedeas bond on respondent's successful appeal.

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No. 86-1405

IN THE

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OCTOBER TERM, 1986

BOSE CORPORATION,
PETITIONER,

V.

CONSUMERS UNION OF UNITED STATES, INC.,
RESPONDENT.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Consumers Union of United States, Inc., the respondent herein, respectfully opposes the Petition for a Writ of Certiorari filed by the petitioner Bose Corporation.

THERE IS NO CONFLICT BETWEEN THE CIRCUITS

Contrary to petitioner's assertions, the per curiam decision of the Court of Appeals upholding an award of costs to Respondent of $5,218.54 for a letter of credit to secure a supersedeas bond, is not in conflict with any decision of any other federal Court of Appeals. Although petitioner makes much of the different results reached by the Court of Appeals here and the Second Circuit in Lerman v. Flynt Distributing Co., 789 F.2d 164 (2d Cir. 1986), no true conflict exists. In Lerman the successful appellant borrowed $1,000,000 for use as collateral for a supersedeas bond. It sought to recover as costs the difference between the 15% interest charge it paid on the borrowed $1,000,000 and the amount that would have been made if the money had been invested in a money market. The Lerman appellant put up this money

without court approval only after it could not secure a letter of credit to back its bond. The Second Circuit disallowed the interest charges that appellant sought to assess as costs, holding that such "large or unusual" expenses should be court approved before they can be awarded as costs.

Here, the Court of Appeals sharply distinguished the facts in Lerman pointing out that the costs sought to be recovered there were "unreasonable" (A.5) and were incurred by that appellant with "no attempt to mitigate its expenses." As The Court of Appeals here specifically found no suggestion of large or unreasonable charges or resultant greater total costs by reason of the collateral securing the supersedeus bond.

The Court of Appeals properly based its finding on this Court's decision in that holding

Farmer v. Arabian American Oil Co., 379 U.S. 227 (1964), the standard for reviewing a district court's taxation is abuse of discretion. Where, as here, the costs sought to be recovered are reasonable and did not result in increasing the total cost of a bond without collateral, there has been no abuse of discretion.

Petitioner harps on what it perceives as the failure of the Court of Appeals' decision to include an explicit discussion of the three factors that the Second Circuit stated in Lerman were essential to its earlier contrary holding in Trans World Airlines, Inc. v. Hughes, 515 F.2d 173 (2d Cir. 1975). Although the Court of Appeals did not specifically discuss these factors, they are clearly subsumed within its decision. In fact, an application of those three factors to the facts here demonstrates that respondent's position is very similar to that of the appellant in TWA.

In TWA, while the letter of credit posted by the appellant was in lieu of a supersedeas bond, the appellant was required to post additional security to secure its letter of credit. Similarly, here, respondent was required to post additional security in the form of a letter of credit to secure its supersedeas bond. Like the respondent here, the TWA appellant did not obtain approval by either the Court or its adversary for the posting of the additional security. Finally, as was the case in TWA, there seems little doubt that the combined cost of respondent's bond premium plus its letter of credit fee was less than or, at the very most, equal to the cost of an uncollateralized bond.

As respondent meets the three factors described in Lerman as essential to the TWA result, it is evident that the decision of Court of Appeals is fully consistent with the controlling decisional law in the Second

Circuit. Consequently, there is no conflict here between the decisions of First and Second Circuits.

FRAP 39(e) CODIFIED EXISTING DECISION LAW

As petitioner correctly suggests, FRAP 39(e) is nothing other than the codification of the long-standing holding that the costs of obtaining a supersedeas bond are properly taxed as an item of costs. Sunkist Growers, Inc. v. Winckler & Smith Citrus Products, 316 F.2d 799 (2d Cir. 1966); In re Northern Indiana Oil Co., 192 F.2d 139 (7th Cir. 1951).

In Sunkist the Ninth Circuit specifically allowed more than the bare premium and taxed as costs other expenses incurred in posting the indemnity for the appeal. Petitioner argues that the drafters of Rule 39(e) did not intend to incorporate the Sunkist holding into the Rule. However, the Advisory Committee's

notes concerning the Rule, quoted in the Petition (19), state in effect that Rule 39(e) is the adoption of the existing practice in the Ninth, Second and Seventh Circuits. It strains credulity to suggest that the Advisory Committee would state that it is adopting the Ninth Circuit's practice while at the same time rejecting that Circuit's controlling decision.

In awarding respondent its costs, the Court of Appeals followed the position advanced by the courts in Sunkist and TWA and declined to adopt the position advanced by petitioner here. Moreover, as set out above, its decision is not inconsistent with the Lerman decision. There is therefore no question regarding the interpretation of FRAP 39(e) for this Court to resolve.

Finally, petitioner argues that this Court should grant certiorari merely because the

cost of the letter of credit was greater than the premium paid for the bond. This argument displays a fundamental ignorance of the manner in which supersedeas bonds are financed and ignores the interrelationship between the amount of the bond premium and the amount and kind of collateral posted. Moreover, this argument has nothing to do with the decision of Court of Appeals or the interpretation of FRAP 39(e). However, it does point up one relevant and important consideration for this Court; i.e., the dollar amount involved. The amount involved here is so insignificant that it does not merit the time or attention of this Court.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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NO. 86-1405

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

BOSE CORPORATION,
PETITIONER,

v.

CONSUMERS UNION OF THE UNITED STATES, INC.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONER

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1. Respondent begins its brief by falsely representing, "Contrary to Petitioner's assertions, the per curium decision of the Court of Appeals . . . is not in conflict with any decision of any

other federal Court of Appeals (Br. Op. 2)." That assertion is squarely contradicted by the opinion of the court below (Pet. A5). If there be any doubt about the conflict, the AUTO-CITE listing of Lerman v. Flynt Distributing Co., 789 F.2d 164 (2d Cir. 1986)(available on LEXIS terminals) expressly identifies the decision of the court below as being in conflict with Lerman.

While respondent expressly states, "THERE IS NO CONFLICT BETWEEN THE CIRCUITS (Br. Op. 2)," respondent makes no express statement contradicting our position that the decision of the court of appeals is in conflict with Farmer v. Arabian American Oil Co., 379 U.S. 227 (1964)(Pet. 12-14). Br. Op. 1-9.

2. Respondent misleadingly represents that "petitioner correctly suggests . . . FRAP 39(e) is nothing other than

the codification of the long-standing holding that the costs of obtaining a supercedeas bond are properly taxed as an item of costs. Sunkist Growers, Inc. v. Winckler & Smith Citrus Products, 316 F.2d 799 (2d Cir. [sic] 1966); In re Northern Indiana Oil Co., 192 F.2d 139 (7th Cir. 1951) (Br. Op. 6)."

What we actually said was that the Advisory Committee expressly limited cost recovery under Rule 39(e) to "the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, . . . (Pet. 19)." (Emphasis added). Sunkist was not cited by the Advisory Committee, and Northern Indiana Oil Co. was cited by the Advisory Committee as one of four cases supporting the foundation for that language because "Provision for taxation of the cost of premiums paid for supersedeas bonds is

common in the local rules of district courts and the practice is established in the Second, Seventh and Ninth Circuits." (Emphasis added).

Regardless of whether the court below or the Second Circuit is correct in ruling on whether Rule 39(e) authorizes taxing costs in addition to "the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal," it is important that this Court resolve that question to guide lawyers in securing judgments pending appeal, and courts in properly taxing costs claimed by a securing party.

3. Respondent falsely states that "respondent meets the three factors described in Lerman as essential to the TWA result . . . (Br. Op. 5)." Respondent met none of them.

The Second Circuit Court of Appeals said:

> Critical to our decision in Trans World Airlines were three circumstances. First, the costs held taxable "were costs in lieu of providing a supersedeas bond as provided by the rules." Id. at 177 (footnote omitted). We held that the letter of credit served the same purpose as a supersedeas bond[1] and agreed with the District Court that the fee paid on the letter of credit was an allowable cost of appeal because it was analogous to the bond premium cost authorized by Rule 39(e). The audit and security costs were also held taxable because they served the same purpose as the letter of credit, that is, providing adequate security to T.W.A. Second, the alternate arrangements in lieu of a supersedeas bond were agreed to by the party opposing the appeal and approved by the District Court. Id. at 177. Third, the alternative arrangements cost less than a supersedeas bond would have cost. Id. at 178. 789 F.2d at 166.

Manifestly, in the case at bar the costs of the letter of credit were not

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[1] A letter of credit was used only because the size of the judgment made obtaining a supersedeas bond "impracticable." Id. at 175.

"costs in lieu of providing a supersedeas bond as provided by the rules," but were in addition to "the premiums paid for cost of supersedeas or other bonds to preserve rights pending appeal . . . (Pet. 6)." Nor were any "alternate arrangements in lieu of a supersedeas bond" "agreed to by the party [petitioner] opposing the appeal and approved by the District Court." Nor is there any evidence of "alternative arrangements [that] cost less than a supersedeas bond would have cost."

4. Without citation of authority, respondent concludes, "The amount involved here is so insignificant that it does not merit the time or attention of this Court (Br. Op. 8)."

Nothing in Rule 17 mentions amount in controversy as a consideration governing review on certiorari. This

case does involve many considerations set forth in the rule for granting certiorari, including conflict between circuits (Pet. 11-12), conflict with an applicable decision of this Court (Pet. 12-14), and an important question of federal law which has not been, but should be, settled by this Court (Pet. 14-16).

Furthermore, the Court may decide the question presented on a compact record that will enable the Court to concentrate on an answer to a question of law that will be important to every court and litigant involved in a case requiring security pending appeal. Not only is the answer important at cost taxing time when the secured judgment is reversed, but it is also important at security posting time to encourage lawyers to work with the courts in reaching agreement on the form of security and who pays what costs

if the judgment is reversed.

The conflict with decisions of this Court, the Second Circuit, the applicability of Rule 39(e) to many cases, the national importance of having a uniform interpretation of the Federal Rules of Appellate Procedure and the other reasons presented in the Petition support a conclusion that the Petition should be granted, regardless of which party eventually prevails.

CONCLUSION

For the foregoing reasons and those advanced in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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